

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

DANA K. WHISLER)	
Claimant)	
VS.)	
)	Docket No. 152,107
THE BOEING COMPANY)	
Respondent)	
AND)	
)	
AETNA CASUALTY & SURETY)	
Insurance Carrier)	
AND)	
)	
KANSAS WORKERS COMPENSATION FUND)	

ORDER

Claimant appeals from an Award on Review and Modification entered by Administrative Law Judge John D. Clark on November 19, 1996. The Appeals Board heard oral argument April 9, 1997.

APPEARANCES

Gary K. Jones of Wichita, Kansas, appeared on behalf of claimant. Frederick L. Haag of Wichita, Kansas, appeared on behalf of respondent and its insurance carrier. Andrew E. Busch of Wichita, Kansas, appeared on behalf of the Kansas Workers Compensation Fund.

RECORD AND STIPULATIONS

The record includes the record submitted in the original proceedings and, in addition, the deposition testimony of Dana K. Whisler taken October 29, 1996, and the transcript of the hearing held September 24, 1996, on respondent's Application for Review and Modification. There were no stipulations taken in connection with the review and modification proceedings.

ISSUES

On appeal, claimant lists the following issues:

- (1) Nature and extent of disability.
- (2) The application of Romeo v. Smith Temporary Service, Docket No. 184,711.
- (3) Whether presumption of no work disability should apply.
- (4) Claimant's attorney fees.
- (5) Recomputation of average weekly wage.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Appeals Board finds and concludes that the Award on Review and Modification by the Administrative Law Judge should be modified.

The Appeals Board originally entered an Award in this case on April 26, 1995, granting claimant benefits for an accidental injury to claimant's right and left arms and shoulders. The Board awarded benefits based upon a 9 percent general disability on a functional impairment basis from the date of accident to May 11, 1993, while claimant earned a comparable wage. From May 11, 1993, when claimant was laid off, the Appeals Board awarded benefits based upon a 52 percent work disability. On review and modification, respondent produced evidence indicating claimant had returned to work for respondent on June 20, 1996, and began again to earn a comparable wage. Respondent filed its Application for Review and Modification on August 15, 1996. Respondent argues that the award should, therefore, be reduced to one based upon the 9 percent disability effective June 20, 1996, the date claimant returned to work at a comparable wage. Claimant, on the other hand, argues that the award should remain an award for work disability.

The specific issues will be discussed in the order listed above.

(1) Nature and extent of disability.

As above indicated, the Appeals Board originally found that claimant sustained a 9 percent functional impairment. None of the evidence presented on review and modification relates to or suggests any change in the functional impairment. The sole issue regarding nature and extent is whether the award should be based upon that functional impairment or, on the other hand, whether claimant is entitled to work disability. For the reasons stated below, the Appeals Board has concluded that the award should be based upon the functional impairment. The functional impairment remains 9 percent to the body as a whole.

(2) The application of Romeo v. Smith Temporary Service, Docket No. 184,711.

In the Award on Review and Modification, the Administrative Law Judge applied rules stated in the Romeo decision for recalculation of an award under the law which became effective July 1, 1993.

At the time of oral argument, the parties agreed that the Romeo decision has no application to this case. The current case involves a date of accident prior to those amendments which governed the Romeo decision. Under the Romeo decision, review and modification may, in some instances, result in the termination of benefits because the full number of weeks awarded on review and modification have already been paid. Under the old act calculations (pre-July 1, 1993) applicable to this case, benefits for a general body disability run for a full 415 weeks. Review and modification adjusts the amount of the weekly payment, not the number of weeks.

(3) Whether the presumption of no work disability found in K.S.A. 44-510e should apply to this case.

The version of K.S.A. 1989 Supp. 44-510e applicable at the time of claimant's injury provided in pertinent part:

"There shall be a presumption that the employee has no work disability if the employee engages in any work for wages comparable to the average gross weekly wage that the employee was earning at the time of the injury."

Claimant acknowledges she is now earning more per week than she was at the time of the injury in this case. She, nevertheless, argues that the presumption of no work disability should not apply because, according to claimant, she was returned to work after the injury at a lower grade level and she would be earning more if she remained at the same grade level she was in at the time of the injury. The argument made by claimant does not, in our view, find support in the statutory language.

Claimant would have the Appeals Board convert the language so that there is a presumption of no work disability only if the employee earns wages comparable to what she would be earning had she remained in the job she was in at the time of the injury, including any pay raises she would receive in that position. The statute, however, activates the presumption any time the claimant earns what she was earning at the time of the injury. In this case claimant is earning more than she was earning at the time of the injury. The presumption applies.

(4) Claimant's attorney fees.

The Award on Review and Modification was prepared by respondent's counsel and submitted to the Administrative Law Judge for his signature. Claimant's counsel represents that he did not have an opportunity to present his request for attorney fees to the Administrative Law Judge. The proposed award was submitted to the Administrative Law Judge without an opportunity for input from claimant's counsel. The request for attorney fees is, therefore, remanded to the Administrative Law Judge for decision after both parties have an opportunity to present evidence.

(5) Recomputation of average weekly wage.

The award on review and modification based the benefits upon an average weekly wage which does not include the value of fringe benefits. Those fringe benefits were added to claimant's average weekly wage for the time she was laid off and the fringe benefits discontinued. The record indicates that once claimant returned to her employment for respondent the fringe benefits were reinstated. K.S.A. 1989 Supp. 44-511 states in pertinent part as follows:

"Additional compensation shall not include the value of such remuneration until and unless such remuneration is discontinued. If such remuneration is discontinued subsequent to a computation of average gross weekly wages under this section, there shall be a recomputation to include such discontinued remuneration."

Claimant points out this statute specifically refers to adding the value of fringe benefits once they are discontinued but makes no similar reference to subtracting them if they are reinstated. The Appeals Board considers the general intent of the statute to be clear. The value of fringe benefits should be added only if they are not being paid by the respondent. Once they are reinstated they are no longer discontinued. Accordingly, in this case, the average weekly wage should be \$616.77.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge John D. Clark dated November 19, 1996, should be, and is hereby, modified.

WHEREFORE, THE AWARD OF COMPENSATION originally entered in this case by the Appeals Board on April 26, 1995, is hereby modified effective June 20, 1996, by changing the average weekly wage to \$616.77 and reducing the remaining weekly permanent partial disability benefit to \$37.01 per week. As of June 20, 1996, there remained 88.43 weeks to be paid at the new rate. Any overpayment by respondent for any period after June 20, 1996, is to be credited against future payments.

The issues concerning attorney fees are remanded to the Administrative Law Judge for decision on what is a reasonable attorney fee.

IT IS SO ORDERED.

Dated this ____ day of April 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Gary K. Jones, Wichita, KS
Frederick L. Haag, Wichita, KS
Andrew E. Busch, Wichita, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director